IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 11TH JULY 2007 / 20TH ASHADHA 1929

FAO.No. 188 of 2007()

AS.146/2000 of II ADDL. DISTRICT COURT, KOLLAM
OS.475/1991 of MUN-MAGI COURT, PARAVOOR

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APPELLANT/2ND RESPONDENT/2ND PLAINTIFF:

RAJENDRAN, S/O. BALAKRISHNAN,
PUTHUVILA VEEDU, KONAYIL, PARAVOOR.

BY ADV. SRI.SUBHASH CYRIAC

RESPONDENTS: APPELLANT AND RESPONDENTS 3 AND 5 TO 16 /DFTS.2 TO 15

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1. DR.MRS.SUSHAMA SREEKUMAR,
NEELGIRI, KOONAYIL, PARAVOOR, NOW RESIDING AT 10312, NEWHAMSHIRE AVENUE, SILVER SPRING MARY LAND USA-20903, REPRESENTED BY HER POWER HOLDER, NARAYANA MADHAVAN, PADINJARE ARANINNAVILA, KOTTAPURAM, SOUTH PARAVOOR, KOLLAM.

2. N. DHARMARAJAN,
NEELGIRI, KOONAYIL,PARAVOOR FROM VADAKUMVILA VEEDU KOTTAPURAM.

3. N. PAKAJAM,
JM RESIDENCY, 2-D, THAMPANOOR,THIRUVANANTHAPURAM FROM NISHA BHAVAN, POOTHAKULAM, PARAVOOR.

4. SUMANGALA NEELAKANDAN,
NEELGIRI, KOONAYIL PARAVOOR, NOW RESIDING AT SREESHYLAM, TC-4-2552(2), KURUNGANNOOR, PATTOM, THIRUVANANTHAPURAM.

5. ASHA VENUGOPALAN,
7A ANASUYA AVENUE, CRMES KILPUR (P.O), TAMILNADU.

6. ABHA KRISHNAN OF -DO -DO-.

7. ARYA S.JAYARAJ,
BHAVANI NIVAS, CHAYAKKUDI ROAD, PETTA,
THIRUVANANTHAPURAM. RESIDING AT SREESHYLAM,
T.C.2552(2) KURANGANNUR, PATTOM, TRIVANDRUM.

8. C. KESAVAN,
ANASUYA AVENUE, CRMES KILPUR (P.O), TAMILNADU.

9. CHANDRIKA RAJAN,
SREELATHAYIL, TC-4/866, PARVATI NAGAR,
KAVADIYAR P.O., THIRUVANANTHAPURAM.

10. SHEELA RAJAN OF -DO--DO-.

11. SREEJA RAJAN OF -DO- - DO-.

12. GEETHA RAJAN OF -DO- -DO-.

13. SANDEEP, S/O. MRIDULA,
DEEPTI, CHERUKUNNAM, VARKALA.

14. SMITHA OF -DO- -DO-.

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 11/07/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

F.A.O.No.188 of 2007

Dated this the 11th July, 2007.

J U D G M E N T

The second plaintiff in O.S.No.475/1991, on the file of the Munsiff Magistrate Court, Paravoor, is the appellant. The appellant along with his father filed a suit impleading one Lekshmi, alleging that he came into possession of a building as a tenant, but subsequently that building fell down, and he constructed shop rooms spending his money, and defendant was trying to demolish that building. Initially, the prayer was for a decree of permanent prohibition. After getting a decree of permanent injunction, the decree was amended incorporating a relief of declaration of title and possession also, obviously, without any notice to the defendant. Even if the defendants remained ex-parte, that can only mean that they had no objection in granting a decree of injunction against forcible eviction. That does not mean that decree of injunction can be corrected using the power given to the Court under Section 152 of the Civil Procedure Code to a declaratory decree which seriously affect substantial right of parties. Defendant died and his daughter has filed an appeal with a petition to condone a delay of more than five years. The lower appellant court

condoned the delay petition. The lower appellate court, after considering the case, set aside the judgment and decree of the trial court, and remanded the case back to the trial court, for fresh consideration and disposal, to afford an opportunity to the parties to contest the matter on merits. Challenging that judgment, this appeal is filed.

2. The main contention raised by the appellant is that since the petition filed by the first respondent, the appellant in A.S.No.146/2000, under Order IX Rule 13 of Civil Procedure Code was dismissed, the lower appellate court ought to have dismissed the regular appeal also. There is absolutely no merit in that argument . The points arising for consideration of the regular appeal and an appeal arising from Order IX Rule 13 of Civil Procedure Code are entirely different. In a petition under Order IX Rule 13 of Civil Procedure Code, the court is called upon to consider whether there was any sufficient cause for the non appearance of the defendant. But in an appeal against a decree, points arising for consideration are different. The court below found that the first respondent had shown sufficient cause for condoning the delay in filing the appeal. The dismissal of C.M.A. will not affect that finding also. In the C.M.A., the

court has considered only whether any sufficient cause for the non-appearance was shown before the passing of the decree. In the petition filed for condoning the delay in filing the appeal, the Court considered whether the first respondent had explained the delay properly. It was found that she had explained the delay and allowed the petition to condone the delay. That order is perfectly correct and does not call for any interference. It is also to be noted that C.M.A. filed against the order dismissing the petition to set aside the ex-parte decree was dismissed for default. So, there is no question of any resjudicata arises. Dismissal of Order IX Rule 13 is not a bar for filing a regular appeal also.

3. The material available now shows that the appellant had played fraud on the Court. As I have already stated, copy of the judgment produced by the appellant himself shows that the sole defendant did not appear and contest. She died and her legal representatives were impleaded. The contesting respondent was not living in India. Initially, an injunction decree was passed. Thereafter, a petition for correction was filed. There is nothing on record to show that notice of that petition was served on the defendants. The Trial Court simply corrected the decree making it a declaratory one by

which it was declared that the appellant is the owner of the suit property. The trial court was gracious enough to grant the relief sought for, without hearing the affected parties. As already stated, the lower appellate court, after considering the pleadings and evidence, thought it fit to set aside the decree, and remand the matter to give an opportunity to the affected person to contest the matter on merits. No question of law much less substantial question of law arises in this appeal. Hence, the appeal is only to be dismissed.

In the result, the appeal is dismissed.

K.PADMANABHAN NAIR,
JUDGE

nj.